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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

NO. 430

EDNA R. CARROLL, JOHN CLYDE FISHER and BEATRICE Z. MILLER, Petitioners,

v.

ALLEN B. DUMONT LABORATORIES, INC., PHILCO TELEVISION BROADCASTING CORPORATION, TRIANGLE PUBLICATIONS, INC., WCAU, INC., and WGAL, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners, Edna R. Carroll, John Clyde Fisher and Beatrice Z. Miller, pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit, entered in the above-entitled case.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania (R. 315a) is reported at 86 F. Supp. 813. The opinion of the Court of Appeals for the Third Circuit (R. .....) is reported at 184 F. 2d 153.

JURISDICTION.

The judgment of the Court of Appeals was entered on September 5, 1950 (R. ....). The jurisdiction of the Court is invoked under 28 U.S.C. Sec. 1254.

QUESTIONS PRESENTED.

1. Do the provisions of the federal Communications Act of June 19, 1934, 47 U.S.C. Sec. 151, *et seq.*, and in particular the definition of "radio communication" apply to and include communications by *television*?

2. Does the activity of a television station in projecting a film upon the mosaic—a mica plate—of an iconoscope amount to interstate commerce or is it an activity which precedes interstate commerce?

3. Has Congress by the Communications Act occupied the field so completely as to invalidate a State statute providing for censorship of films used in television and prohibiting the broadcasting of such as are found by the State Board of Censors to be sacrilegious, obscene, indecent, or immoral or tend to debase or corrupt morals?

The Pennsylvania statute expressly excepts films which contain announcement or advertising or current news events or happenings.

4. Has Congress occupied the field so completely that the State may not provide for censorship of films under its police power to protect the public from exhibitions of films which are sacrilegious, obscene, indecent, or immoral or tend to debase or corrupt morals?

5. Is the State statute providing censorship so in conflict with the federal Communications Act that the two statutes cannot be reconciled?

6. Does this requirement of censorship impose an undue or unreasonable burden upon interstate commerce?

7. Is the censorship of motion picture films used in television, a subject which requires one uniform rule or system of regulation by Congress?

8. Does the censorship of motion picture films used in television, as provided by the Pennsylvania statute infringe the guarantee of freedom of speech or press? This question was raised by the respondents and argued by counsel before the District Court and the Court of Appeals, but was not decided in the opinion of either court.

STATUTES AND REGULATIONS INVOLVED.

The relevant provisions of the statutes and regulations are printed in the Appendix *infra*, pp. 30, 31.

STATEMENT.

This petition is filed to review a declaratory judgment of the District Court for the Eastern District of Pennsylvania. The civil action was brought by five corporations holding licenses from the Federal Communications Commission to engage in broadcasting by television from offices and facilities located in Pennsylvania (R. 3a-5a; 8a-10a). Four of the plaintiffs are affiliated with national television networks and one is owned and operated by a national television network (R. 14a-15a).

The defendant, Edna R. Carroll, Chairman, and the other defendants are members of the Pennsylvania State Board of Censors, an administrative board included within the Department of Public Instruction of Pennsylvania (R. 5a-6a).

The Pennsylvania Act of May 15, 1915, P. L. 534, 4 Purd. Stat. Sec. 43, creates the State Board of Censors and provides for the censoring of motion picture films. This act exempts from censorship films containing advertising or current news events and authorizes the Board to disapprove such motion picture films as are sacrilegious, obscene, indecent, immoral or tend to debase or corrupt morals.

In January 1949 the defendant promulgated a regulation which provided that motion picture films should not be projected by television in Pennsylvania until approved by the Board (R. 16a-17a).

This regulation was adopted after receiving criticisms from exhibitors of motion pictures, whose films were required to be censored, and after conferences with experts on television (R. 280a).

Films make up a large proportion of the programs which are broadcast by television. Estimates were offered by plaintiffs that the proportion ranged from thirty-one to fifty-two per cent and might increase to eighty per cent (R. 63a, 94a-95a, 270a).

Motion picture studios are very averse to selling, for use in television, any films that are less than ten years old (R. 83a-84a; 98a-99a), their purpose being to protect themselves from competition of television. Many other films from private exchanges are used (R. 8a).

A motion picture film is transmitted by television through the use of an iconoscope which is a kind of tube (R. 37a). The image from the film is projected upon the mosaic—a small mica plate—which is part of the iconoscope, causing a series of electrical impulses to be transmitted by wire or radio to receiving sets owned by the public (R. 37a, 39a).

This activity of projecting a film upon the mosaic takes place entirely in Pennsylvania.

The calculated range of the television broadcasting stations is about 45 miles, although programs have been received at a distance of 85 miles (R. 30a-32a).

Some of the programs broadcast by plaintiffs may be received on receiving sets located outside of Pennsylvania or be delivered by wire or relay for broadcast by television stations located outside of Pennsylvania (R. 29a-32a).

Some of the programs furnished by plaintiffs' stations are produced at points outside of Pennsylvania and are delivered to plaintiffs by a wire or radio (R. 181a).

There is no method by which television broadcasts of the plaintiffs can be confined so as to be received only by receiving sets located in Pennsylvania, or to prevent them from being received by receiving sets in other states which are within range. Likewise, there is no method of preventing programs broadcast in adjoining states from being received by sets located in Pennsylvania (R. 32a-33a).

No censorship of motion picture films is provided or required by the Federal Communications Act of June 19, 1934, 47 USCA, Sec. 301, or by any other Federal law. Applicants for licenses to operate a television station are required by this act to be submitted to the Federal Communications Commission and must contain information as to the character and citizenship of the applicant and the type of program service the applicant intends to furnish. Films used by such licensees are not censored by any Federal authority but the choice is left entirely to the licensee.

The Court of Appeals for the Third Circuit held that "Congress has occupied fully the field of television regulation" and the "Commonwealth of Pennsylvania cannot censor the films used on the programs of the plaintiffs' stations."

The Court of Appeals affirmed the decree of the District Court in enjoining the defendants from censoring such films.

REASONS FOR ALLOWANCE OF WRIT.

(1) By ruling that the provisions of the federal Communications Act include communication by *television,* the court below has decided an important question of federal law which has not been, but should be, settled by this court.

No Act of Congress specifically regulates television. Plaintiffs rely upon the Federal Communications Act of June 19, 1934, 47 U.S.C.A. Sec. 301, which regulates communication by *radio.* The Federal Communications Commission for some years has exercised jurisdiction over television and has issued licenses to stations for broadcasting by television.

(2) In ruling that the activity of a television station in projecting a film upon the mosaic — a mica plate — of an iconoscope, amounts to interstate commerce, the court below decided the federal question in a way probably in conflict with the decision of this court in *Utah Power & Light Co. v. Pfost* 286 U. S. 165 (1932). The Utah Power case held that the generation of electrical current and the transmission of it were two separable and distinct operations and that the first activity of producing electrical energy was "purely intrastate" (p. 182).

(3) In ruling that "Congress has occupied fully the field of television regulation" and the "Commonwealth of Pennsylvania cannot censor the films used", the court below decided an important question of law which has not been, but should be, settled by this court. The ruling of the court below is probably in conflict

with the decisions of this court defining the scope of the Communications Act generally. Thus in *National Broadcasting Co. v. United States,* 319 U. S. 190 (1943), Mr. Justice Frankfurter said:

> "The criterion governing the exercise of the Commission's licensing power is the 'public interest, convenience, or necessity.' * * * (215)
>
> * * * * * * *
>
> "The *avowed aim* of the Communications Act of 1934 *was to secure the maximum benefits of radio to all the people* of the United States. * * *" (217) (Italics added)

Likewise in *Regents v. Carroll,* 338 U. S. 586 (1950) Mr. Justice Reed said:

> "* * * *The public interest, after all, is in the effective use of the available channels, and only to that extent in what particular applicant receives a license* * * *." (602) (Italics added)

In addition, this court on October 9, 1950, denied certiorari in *Cavanaugh, et al. v. Gelder, et al.,* No. 172, in which the Supreme Court of Pennsylvania decided that the Communications Act did not occupy the field so completely as to invalidate a license tax upon owners of television receiving sets who held liquor licenses issued by the Liquor Control Board of Pennsylvania. The specific question was raised and decided by the Supreme Court of Pennsylvania upon petition for a reargument (See Record in that case, p. 69).

(4) In holding that the Communications Act precluded Pennsylvania from censoring motion picture films used in television, the court below decided a federal question probably in conflict with the line of decisions

of this court which held that police laws of a state are superseded only where the conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together (See cases *infra*, p. 20).

There is no evidence that the federal Communications Commission suspended licenses because of obscenity of programs before the date of expiration of the license. Max Goldman, Assistant General Counsel in litigation, testified that while the Commission received complaint about programs from the public (302a), it would not suspend a license for obscenity, though cumulative, and would take no action, until the license came up for renewal at the end of the three year period (305a, 307a); and further that the Commission refuses to furnish opinions on questions of obscenity in a proposed program (308a), and has never revoked or suspended a license for alleged violation of the moral code of a community.

(5) The court did not give sufficient effect to the decision of this court in *Mutual Film Corporation v. Industrial Commission of Ohio*, 236 U. S. 230 (1915), which held the Moving Picture Censorship Act of Ohio to be a proper exercise of the police power of the state and not to violate the Commerce Clause.

This court denied certiorari on October 16, 1950, in *RD-DR Corporation and Film Classics, Inc. v. Smith*, 183 F. 2d 562 (1950), in which the Court of Appeals for the Fifth Circuit held that a city ordinance requiring censorship of films did not violate the Fourteenth Amendment. In this case a determined attack was made by the film producers upon the decision of this court in *Mutual Film Corporation v. Ohio Industrial Commission*, 236 U. S. 230 (1915).

(6) The general and public importance of the questions in this case is shown by the fact that witnesses for the television broadcasting companies estimated that films composed from 31% to 52%, and might increase to 80%, of the programs which are broadcast by television (R. 63a, 94a-95a, 270a).

Other states who have statutes requiring censorship of motion picture films are interested in the determination of this case.

BRIEF IN SUPPORT OF PETITION.

I.

THE PENNSYLVANIA STATUTE DOES NOT APPLY TO OR REGULATE INTERSTATE COMMERCE BUT REGULATES ONLY AN ACTIVITY WHICH PRECEDES INTERSTATE COMMERCE.

A motion picture film is transmitted by television through the use of an iconoscope which is a kind of tube (37a). The image from the film is *projected* upon the mosaic—a small mica plate—which is part of the iconoscope, causing a series of electrical impulses to be transmitted by wire or radio (37a, 39a).

The activity of projecting from a film takes place entirely in a station located in Pennsylvania. The transmission of the pictures and sound produced from the film is a separate activity. Projection and transmission are two separate and distinct operations. An analogy may be found in the case of—

Utah Power & Light Co. v. Pfost, 286 U. S. 165 (1932).

The light company owned a water fall and generating station, both located in Idaho, and produced elec-

trical current and transmitted it across the boundary into Utah where it was supplied to consumers. An Idaho statute provided that any corporation engaged in the generation of electricity, by any means, for sale, should pay a license tax of one-half mill per kilowatt hour.

The light company contended that the generator was merely an instrumentality of interstate commerce and that the generating and transmitting were simultaneous and inseparable and therefore the whole activity was interstate commerce, and not subject to taxation by the State.

The Supreme Court affirmed a decree dismissing the bill of the light company for an injunction to restrain the collection of the tax.

In a unanimous opinion of the court, Mr. Justice Sutherland said:

> "* * * The result is not merely transmission, nor is it transmission of the mechanical energy of falling water to the places of consumption; but it is, first, conversion of that form of energy into something else, and, second, the transmission of that something else to the consumers. While conversion and transmission are substantially instantaneous, they are, we are convinced, *essentially separable and distinct operations. The fact that to ordinary observation there is no appreciable lapse of time between the generation of the product and its transmission does not forbid the conclusion that they are, nevertheless, successive and not simultaneous acts.*
>
> * * * * * * *

"Without regard to the apparent continuity of the movement, appellant, in effect, is engaged in two activities, not in one only. *So far as it produces electrical energy* in Idaho, *its business is purely intrastate,* subject to state taxation and control. In transmitting the product across the state line into Utah, appellant is engaged in interstate commerce, and state legislation in respect thereof is subject to the paramount authority of the commerce clause of the federal constitution. * * *" (182) (Italics ours)

Hope Gas Co. v. Hall, 274 U. S. 284 (1927).

A statute of West Virginia imposed a tax upon the production of natural gas, measured by the value of the product at the well.

The Supreme Court unanimously held that this tax was not in violation of the Commerce Clause.

The Supreme Court said:

"The chief business of plaintiff in error is production and purchase of natural gas in West Virginia and the continuous and uninterrupted transportation of this through pipe lines into Pennsylvania and Ohio, where it is sold, delivered and consumed. * * *" (287-288)

The pressure from the well would propel the gas in the pipe line so that there was continuous transportation.

The *Utah Power & Light Co. v. Pfost* case, *supra,* has been approved and followed in many decisions of the Supreme Court of the United States, including:

Federal Compress Co. v. McLean, 291 U. S. 17 (1934);
Carter v. Carter Coal Co., 298 U. S. 238 (1936);
Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U. S. 604 (1938);
Memphis Gas Co. v. Stone, 335 U. S. 80 (1948);
Ott v. Mississippi Barge Line, 336 U. S. 169 (1949).

The activity of projecting a film before it is broadcast from a station in Pennsylvania takes place entirely in Pennsylvania and clearly precedes interstate commerce. The argument that the projection of a film in a studio in Pennsylvania is but one step in a continuous process, was also made and overruled by the Supreme Court in the cases *supra.*

Transmission by television takes place as the result of the activity of the station in Pennsylvania, just as the transmission of electric current occurred after the operation of the generating plant in the *Utah Power and Light Company* case, quoted on page 29 of our original brief.

The case at bar is much stronger than the *Utah Power* case, in that a television station in Pennsylvania broadcasts to many receiving stations located in Pennsylvania. This commerce is intrastate. Interstate commerce is only involved if, and to the extent that, such programs are received outside of Pennsylvania.

The fact that the film is made outside of Pennsylvania, and sent to a broadcasting station in Pennsylvania, does not make the activity any less subject to the police power of Pennsylvania.

The sending of a film from New York City to a broadcasting station in Pennsylvania merely provides a possible material for the use of the Pennsylvania station. The station can use the film at any time that it chooses or may decide not to use it at all. Sending the film from New York City is not part of a continuous activity. The broadcasting or transmission begins at the Pennsylvania station and not before.

II.

CONGRESS HAS NOT OCCUPIED THE FIELD OF CENSORSHIP OF TELEVISION PROGRAMS.

No Act of Congress specifically regulates television. Plaintiffs rely upon the Federal Communications Act of June 19, 1934, 47 USCA, Sec. 301, which regulates communication by *radio.*

The Federal Communications Act quoted in Appendix (p. 31) is only a partial occupation of the field of regulating communication by radio.

Nowhere in the Communications Act is there any declaration that the act as intended to occupy the field completely or to supersede state legislation.

No language indicates that a licensee is to be allowed to be his own censor and that any censorship by a state is prohibited. The suggestion that the Communications Act established self-censorship, is pure invention.

As was said by Mr. Justice Frankfurter in *National Broadcasting Company v. United States,* 319 U. S. 190 (1943),—

"The criterion governing the exercise of the Commission's licensing power is the 'public interest, convenience, or necessity.' * * *" (215)

"The *avowed aim* of the Communications Act of 1934 *was to secure the maximum benefits of radio to all the people* of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio. * * *" (217) (Italics ours)

We, therefore, submit that Congress has not occupied the field of censorship of motion picture or television programs. It has regulated radio with a view of making "the maximum utilization of radio facilites" and insuring that its facilities are not monopolized by some to the exclusion of others.

As was said in *Regents v. Carroll,* 338 U. S. 586 (February 6, 1950):

"* * * *The public interest, after all, is in the effective use of the available channels, and only to that extent in what particular applicant receives a license.* * * *" (602) (Italics ours)

It will be noted that this section 326 is specifically limited to the "power" of the Commission. Congress here declares that the *Commission* shall not have the power of censorship. This declaration is immediately followed in the same sentence by a provision that no regulation shall be fixed by the *Commission* which shall interfere with the right of free speech.

Congress here is limiting only the power of the Commission. It does not by any word attempt to pro-

hibit a State or commission of a state from censoring radio communications.

The standard of "public interest, convenience or necessity" will not authorize *censorship* of radio or television programs. In addition, such censorship is expressly prohibited by Section 326 of the Federal Communications Act, which is as follows:

> "Nothing in this chapter shall be understood or construed to give the Commission the power to censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." (Italics added)

Nowhere does the Communications Act deal with censorship except in this purely negative provision of Section 326.

The last sentence of this Section 326 was repealed and was incorporated as Section 1464 in the Federal Criminal Code, 18 USCA, Section 1464. This sentence read as follows:

> "No person within the jurisdiction of the United States shall utter any obscene, indecent or profane language by means of radio communication." (48 Stat. 1091)

The very fact that Congress took this sentence out of the Federal Communications Commission Act and put it into the Criminal Code indicated an intent to divorce or separate this provision from the Communications

Act and the regulation of radio by this Act, and to treat it as one among many Federal crimes.

This sentence, however, was in no way inconsistent with the Pennsylvania statute. State and federal statutes frequently make the same act a crime.

This provision in Section 326 is clearly intended to be a restriction upon the powers given to the Communication's Commission in this compact. There is nothing to indicate that this language is directed against action by another sovereign government.

The decisions of this court hold that a declaration that nothing in a statute shall be construed to confer a power or effect a result, does not enlarge the scope of the act or extend its provisions so as to cover persons or matters not otherwise within the act.

Thus in *Auto Workers v. Wisconsin Board,* 336 U. S. 245 (1949), this court held that section 13 of the National Labor Relations Act which provides that nothing in the act shall be construed to interfere with the right to strike, does not conflict with an order of the Board directing a labor union to cease unannounced work stoppages in order to put pressure on the employer.

Mr. Justice Douglas said:

> "* * * 'Congress designedly left open an area for state control' and that the 'intention of Congress to exclude States from exercising their police power must be clearly manifested.' * * *" (253)

Again in *Savage v. Jones,* 225 U. S. 501 (1912), in holding that a similar proviso did not prohibit legislation by a state, Mr. Hughes said:

> "* * * And it is clear that *this provision merely relates to the interpretation of the requirements of the act, and does not enlarge its purview or establish a rule as to the matters which lie outside its prohibitions*". (553) (Italics ours)

It is especially important to note that the Pennsylvania statute does not provide a censorship of films generally, but only for the limited purpose of preventing exhibition of films which are "sacrilegious, obscene, indecent or immoral".

The power to prohibit publication of indecent or obscene matter has existed in the states from their inception, and such matter was the subject of a crime in the English common law.

The same is true of publications which are sacrilegious or immoral.

The Pennsylvania statute (quoted in appendix p. 30), directs the Board of Censors to disapprove such films as are sacrilegious, obscene, indecent or immoral or such as tend, in the judgment of the Board, to debase or corrupt morals.

Prohibiting indecent or obscene or sacrilegious or immoral has not been regarded as interfering with the freedom of speech.

Each subject has been long regarded as proper for the exercise of the police power of the state.

It is true that section 303 (m) provides that the Commission shall have power to suspend a license upon proof that the licensee

> "(D) has transmitted * * * communications containing profane or obscene words, language or meaning. * * *"

This provision is not inconsistent with and does not conflict with the Pennsylvania statute.

Saying that the commission may revoke a license for obscenity after it is committed does not conflict with the power to censor in order to prevent obscenity *before it occurs.*

The Communication's Act, if it is applied, operates upon the licensee and eliminates him. The Pennsylvania state operates upon the film and eliminates it. The two provision clearly are not conflicting. One really supplements the other and accomplishes a result which the other does not.

It may be argued that the possiblity of incurring a penalty or revocation of license will deter operators from offending. The answer is that experience has shown that the possiblity of punishment does not deter criminals or violators of the law. Many objectionable films have beer. produced and their exhibition halted by censorship. There is no reason to believe that the experience in television will be at all different.

Revocation comes after the harm is done.

THE POLICE LAWS OF A STATE ARE SUPERSEDED BY AN ACT OF CONGRESS ONLY WHERE THE CONFLICT IS SO DIRECT AND POSITIVE THAT THE TWO ACTS CANNOT BE RECONCILED OR CONSISTENTLY STAND TOGETHER.

It was so held in—

Kelley v. Washington, 302 U. S. 1, 9-10;

Missouri, Kansas and Texas Railway Company v. Harris, 234 U. S. 412, 418-419;

Maurer v. Hamilton, 309 U. S. 598, 614;

Southern Pacific Co. v. Arizona, 325 U. S. 761, 766;

Allen-Bradley Local v. Board, 315 U. S. 740, 749;

Welch Co. v. New Hampshire, 306 U. S. 79, 84-85.

In *Kelley v. Washington,* 302 U. S. 1 (1937), Chief Justice Hughes said:

> "* * * *Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'*" (9-10) (Italics ours)

In *Missouri, Kansas & Texas Railway Co. v. Harris,* 234 U. S. 412 (1914), Mr. Justice Pitney said:

> "These cases recognize the established rule that a state law enacted under any of the reserved powers—especially if under the police power—is not to be set aside as inconsistent with an act of Congress, *unless there is actual repugnancy, or unless Congress has, at least, manifested a purpose to*

exercise its paramount authority over the subject. 'This court has said—and the principle has been often reaffirmed—that "In the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, *the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.*" Sinnot v. Davenport, 22 How. 227, 243' * * *" (418-419) (Italics ours)

In *Cloverleaf Co. v. Patterson,* 315 U. S. 148 (1942), Mr. Justice Reed said:

> "*When the prohibition of state action is not specific but inferable from the scope and purpose of the federal legislation, it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation.*" (155-156) (Italics added)

III.

RESPONDENTS FAILED TO PROVE THAT THE CENSORSHIP OF MOTION PICTURE FILMS USED IN TELEVISION IS A SUBJECT WHICH REQUIRES ONE UNIFORM RULE OR SYSTEM OF REGULATION BY CONGRESS.

The analysis of the Communications Act made in Point II of this brief is applicable here.

The fundamental reasons why the rule of uniformity does not apply in this case are:

(1) By the Communications Act Congress itself has not established any uniform rule or regulation whatever to govern censorship of films used in motion picture theatres or in television.

(2) The Communications Act does not contain any provision declaring that a state may not provide censorship of films used in television. The only basis for such a contention would be that from the provisions of the Communications Act such a prohibition may be *implied.* The act however does not mention censorship at all except in the provision in section 326 that the act shall not be construed to give the power of censorship to the Commission.

(3) As already has been shown (*supra,* p. 17-18), the provision that the Communications Act shall not give the Commission the power of censorship, does not amount to a prohibition of censorship by a state.

(4) It has not been shown that there are conflicts between the Federal Communications Act and the Pennsylvania statute which are so direct and positive that the two acts cannot be reconciled or consistently stand together.

The provisions for such censorship in Pennsylvania are as follows:

Section 6 of the Act of May 15, 1915, P. L. 534, 4 P. S. Sec. 43, provides:

"Section 6. The Board shall examine or supervise the examinations of all films, reels, or views to be exhibited or used in Pennsylvania; and shall approve such films, reels, or views which are moral and proper; and shall disapprove such as are sacrilegious, obscene, indecent, or immoral, or such as tend, in the judgment of the Board to debase or corrupt morals. This section shall *not apply to announcement or advertising slides* or to films or reels

containing *current news events or happenings,* commonly known as *news reels,* which are not in violation of the provisions of this section." (Italics added)

The Board of Censors on January 22, 1949, adopted the following regulation:

"13 MISCELLANEOUS PROVISIONS:

"(d) Projection of motion pictures by television.

"All motion picture films, reels or views intended for projection or broadcast by television in Pennsylvania must first be submitted by the exchange, owner or lessee of the film, reel or view for censorship purposes, and must not be projected by television in Pennsylvania unless first approved by the Board and a Seal issued therefor upon payment of the proper fee, and said proper approval seal displayed upon every showing."

The act expressly excepts—

"announcement or advertising slides"; and

"films or reels containing current news events or happenings, commonly known as news reels."

The Board does not censor these (55a). The regulation of the Board would necessarily be limited in scope by the provisions of the act.

The Board has been limiting its censorship to full-length feature films (88a).

Methods of transmission in which films are not broadcast in Pennsylvania stations and are therefore not to be censored, include these:

RE-TRANSMISSION.

This is the type of transmission in which one television station picks up from the air the transmission of another television station, just as a set in a home would do, and re-transmits the program over a second television set to an audience within the range of the second station. (36a-37a)

MICRO RELAYING.

The first station uses a number of low-powered very high frequency radio stations operating in tandem, each passing the signal on to the next one for eventual delivery to stations along the route of the relay stations.

Such a system is in operation between New York and Boston. (36a-37a).

CO-AXIAL CABLE.

This is a small tubular wire which carries down its center collected impulses which are electrified every four or five miles along the system, and the signals can be dropped off the intermediate points along the route of the cable. Such a system is used between New York and Washington and from New York to points as far west as St. Louis, (36a-37a)

Respondents have contended that censorship of films by Pennsylvania will cause delays and impose expenses upon the television companies.

Respondents' witnesses testified to various periods of time required for the preparation of films. They enlarge upon the fact that advertisers frequently brought in changes in a film at the last minute. Their periods of time are the result of a practice in which the advertiser does much as he pleases. The respondents are of-

fering this opportunity for last minute changes as an inducement to advertisers to use television and pointing out this advantage in time as compared to advertising in magazines and newspapers where copy must be furnished well in advance of publication (164a-165a). Respondents' desire to secure this competitive advantage furnishes no reason for dispensing with censorship.

It is difficult to believe that conferences and cooperation between the Board and the plaintiffs would not result in working out periods of time and procedures which would be acceptable to both parties.

As shown under Point II of this brief, this court has construed the Communications Act and has concluded that its purpose is to secure the maximum benefits of radio to all the people and to provide in the public interest the effective use of the available channels of communication by radio.

When one considers how far-reaching Nation-wide broadcasting by radio has become, and how tremendous would be its effect on public opinion throughout the United States, there is no cause for wonder that Congress so zealously guarded the right of free speech. Without this protection a dominant political group could take over control of the Commission and of broadcasting and spread its political propaganda by radio and completely suppress any expression of the view of the opposition.

This noble purpose is what is so peremptorily enjoined in this act. Nowhere, however, is there the slightest suggestion of any intent to strip the states of their inherent and traditional power to censor or prohibit the publication of what is indecent or obscene.

IT IS WELL SETTLED THAT A STATE HAS THE POWER TO CENSOR MOVING PICTURE FILMS BEFORE THEY ARE EXHIBITED IN A THEATER.

In *Mutual Film Corporation v. Ohio Industrial Commission,* 236 U. S. 230 (1915), the Moving Picture Censorship Act of Ohio was held to be a proper exercise of the police power of the state and not to violate the Commerce Clause.

The argument was also made, as in the case at bar, that the only remedy should be responsibility or punishment after an improper film was displayed.

The Supreme Court answered:

> "* * * It cannot be put out of view that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio constitution, we think, as part of the press of the country or as organs of public opinion. They are mere representations of events, of ideas and sentiments published and known, vivid, useful and entertaining no doubt, but, as we have said, capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition. It was this capability and power, and it may be in experience of them, that induced the State of Ohio, *in addition to prescribing penalties for immoral exhibitions, as it does in its Criminal Code, to require censorship before exhibition,* as it does by the act under review. We cannot regard this as beyond the power of government." (244-245) (Italics ours)

In *Kovacs v. Cooper,* 336 U. S. 77 (1949), Mr. Justice Frankfurter said:

"* * * Movies have created problems not presented by the circulation of books, pamphlets, or newspapers, and so *the movies have been constitutionally regulated.* Mutual Film Corporation v. Industrial Commission, 236 U. S. 230. * * *"

The authority of the State, we submit, to censor programs originating in Pennsylvania for the benefit of its own citizens, is undoubted; and this power is not lost or curtailed by the fact that some of these programs may spill over into other states.

Plaintiffs' witness, Lodge, testified that "The calculated range is about 45 miles" (32a), although programs have been received by citizens at a distance of 78 or 85 miles (30a, 32a).

Such a situation does not demonstrate that one uniform rule or system of regulation is necessary. The quantity or volume of messages or pictures carried from Pennsylvania stations into other states, has not been shown to be sufficiently great so that a uniform National rule is necessary.

Each state could censor the films televised within its borders, and the loss to adjoining states would be negligible.

The fact that programs broadcasted from an adjoining state may reach into Pennsylvania, furnishes no reason whatever for depriving Pennsylvania of its police power to protect its own citizens against films broadcast in this State.

In *Bell v. Harris,* 178 Georgia 379, 173 S. E. 109 (1934), a license tax upon a radio station was held not to be void as a tax on interstate commerce.

The Supreme Court said:

> "It is claimed by the petitioner that its broadcasting business is interstate, in that some of its messages may go beyond the state lines. Even if it is true that some of its messages do go beyond the state lines, that does not make it interstate business, especially as there is nothing in the evidence to show that it has received or will receive messages to be transmitted beyond the state lines into other states. But, even if it did receive such contracts, its business is certainly almost altogether intrastate; and its income is derived almost entirely, if not altogether, from what might be called intrastate business. * * *" (112)

The Communications Act and the Pennsylvania statute occupy entirely different fields. There is no ground for the application for the test of coincidence, although as was said in

California v. Zook, 336 U. S. 725 (1949)

> "* * * But the fact of identity does not mean the automatic invalidity of State measures. Coincidence is only one factor in a complicated pattern of facts guiding us to congressional intent * * *" (730)

Furthermore, the qualification of the rule of uniformity that a state may regulate local matters, is especially applicable where a state is exercising its police power.

A state statute regulating interstate commerce will not be held to conflict with an act of Congress unless the two acts cannot be reconciled.

Missouri, Kansas and Texas Railway Company v. Haber, 169 U. S. 613
Minnesota Rate Cases, 230 U. S. 352.

Respondents have relied upon the case of *Hines v. Davidowitz,* 312 U.S. 52 (1941). This case held that a Pennsylvania statute providing for the registration of aliens was in conflict with the Federal statute covering the same subject. This decision, however, was almost immediately explained by the Supreme Court as being based upon the exclusive power of Congress over international relations.

Respectfully submitted,

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APPENDIX.

Pennsylvania Act of May 15, 1915, P. L. 534, as amended, 4 Pennsylvania Stat. Ann., Section 41, *et seq.*

* * * * * * *

"Section 2. It shall be unlawful to sell, lease, lend, exhibit, or use any motion-picture film, reel, or view, in Pennsylvania, unless the said film, reel, or view has been submitted by the exchange, owner or lessee of the film, reel, or view, and duly approved by the Pennsylvania State Board of Censors, hereinafter in this act called the Board.

* * * * * * *

"Section 6. The Board shall examine or supervise the examinations of all films, reels, or views to be exhibited or used in Pennsylvania; and shall approve such films, reels, or views which are moral and proper; and shall disapprove such as are sacrilegious, obscene, indecent, or immoral, or such as tend, in the judgment of the Board to debase or corrupt morals. This section shall not apply to announcement or advertising slides or to films or reels containing current news events or happenings, commonly known as news reels, which are not in violation of the provisions of this section.

* * * * * * *

"Section 7. Upon each film, reel, or view which has been approved by the Board there shall be furnished and stamped by the Board the following certificate or statement:

"Approved by
"Pennsylvania State Board
"of Censors

"and shall also furnish a certificate in writing to the same effect, which certificate shall be exhibited to any member of the Board or employe thereof upon demand of the holder thereof.

"In the case of motion pictures, such statement shall be shown on the screen, to the extent of approximately four feet of film.

* * * * * * *

"Section 22. This act shall be enforced by the Board. In carrying out and enforcing the purposes of this act, it may adopt such reasonable rules as it may deem necessary. Such rules shall not be inconsistent with the laws of Pennsylvania."

Regulation of Pennsylvania State Board of Censors.

"Projection of Motion Pictures by Television.

"All motion picture films, reels or views intended for projection or broadcast by television in Pennsylvania must first be submitted by the exchange, owner or lessee of the film, reel or view for censorship purposes, and must not be projected by television in Pennsylvania unless first approved by the Board and a seal issued therefor upon payment of the proper fee, and said proper approval seal displayed upon every showing."

Communications Act of June 19, 1934, 47 U.S.C. Section 151, *et seq.*

Section 151. Purposes of chapter; Federal Communications Commission created.

"For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid,

efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the 'Federal Communications Commission', which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter."

Section 152. Application of Chapter.

"(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; * * *

"(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intra-state communication service of any carrier * * *"

Section 153. Definitions.

"For the purposes of this chapter, unless the context otherwise requires—

"(a) 'Wire communication' or 'communication by wire' means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

"(b) 'Radio communication' or 'communication by radio' means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

* * * * * * *

"(d) 'Transmission of energy by radio' or 'radio transmission of energy' includes both such transmission and all instrumentalities, facilities, and services incidental to such transmission."

Section 301. License for radio communication or transmission of energy.

"It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; * * *."

Section 303. Powers and duties of Commission.

"Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

"(a) Classify radio stations;

"(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

"(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

"(d) Determine the location of classes of stations or individual stations;

"(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

"(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: Provided, however, That changes in the frequencies, authorized power, or in the time of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with;

"(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

"(h) Have authority to establish areas or zones to be served by any station;

"(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

"(j) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

"(k) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion;

"(l) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens of the United States as the Commission finds qualified;

"(m) (1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee—

* * * * * * *

"(D) has transmitted superfluous radio communications containing profane language or obscene words, language, or meaning, * * *."

Section 307. Licenses; allocation of facilities; terms.

"(a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

"(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

* * * * * * *

"(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications."

Section 308. Same; application; conditions and restrictions in license for foreign communication.

"(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; * * *"

Section 309. Same; issuance, renewal, or modification of license; hearings; form; terms; assignment.

"(a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. * * *

"(b) * * *

"(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this chapter."

Section 310. Same; alien ownership as barring grant of license; assignment and transfer of station licenses.

"(b) The station license required, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing."

Section 315. Candidates for public office; facilities.

"If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the Commission shall make rules and regulations to carry this provision into effect: Provided, that such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate."

Section 326. Censorship; indecent language.

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. * * *"

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IN THE

Supreme Court of the United States

October Term, 1950.

No. 430.

EDNA R. CARROLL, JOHN CLYDE FISHER, and BEATRICE S. MILLER,

Petitioners,

v.

ALLEN B. DUMONT LABORATORIES, INC., PHILCO TELEVISION BROADCASTING CORPORATION, TRIANGLE PUBLICATIONS, INC., WCAU, INC., and WGAL, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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ALLEN B. DUMONT LABORATORIES, INC., PHILCO TELEVISION BROADCASTING CORPORATION, TRIANGLE PUBLICATIONS, INC., WCAU, INC., AND WGAL, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania, granting judgment in favor of respondents (R. 313), is reported at 86 F. Supp. 813. The opinion of the United States Court of Appeals for the Third Circuit, affirming the judgment of the District Court (R. 334), is reported at 184 F. (2d) 153.

JURISDICTION.

The judgment of the Court of Appeals was entered September 5, 1950 (R. 340). The petition for a writ of certiorari was filed December 4, 1950. The jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code, 62 Stat. 928 (1948), 28 U. S. C. § 1254 (1) (1946 Supp. III).

QUESTION PRESENTED.

Whether the courts below have properly held that a regulation, adopted by the Pennsylvania State Board of Censors purporting to act under the authority of a Pennsylvania statute authorizing the Board to censor motion picture film, requiring that all film intended for broadcast by television in Pennsylvania be first submitted to the Board for censorship, conflicts with federal legislation and amounts to an exertion of state regulatory power within a field fully occupied by the Congress through the Communications Act of 1934.[1]

STATUTES AND REGULATION INVOLVED.

The regulation of the Pennsylvania State Board of Censors, challenged in this action, provides as follows (R. 323):

> "All motion picture films, reels or views intended for projection or broadcast by television in Pennsylvania must first be submitted by the exchange, owner or lessee of the film, reel or view for censorship purposes, and must not be projected by television in Pennsylvania unless first approved by the Board and a seal issued therefor upon payment of the proper fee, and said proper approval seal displayed upon every showing."

The Pennsylvania Act of May 15, 1915, P. L. 534, as amended, Pa. Stat. Ann., tit. 4, §§ 42-58 (Purdon, 1930),

[1] If the petition for certiorari is granted, respondents will argue that the judgment below is supported on two additional grounds, *viz.*, (1) that the censorship regulation imposes upon interstate commerce a burden prohibited by the commerce clause, Art. I, § 8, Cl. 3 of the Constitution, and would therefore be invalid even in the absence of federal occupation of the field, and (2) that the regulation infringes the freedom of speech and press guaranteed by the First Amendment and protected from state invasion by the Fourteenth Amendment to the Constitution.

under which this regulation was adopted, the relevant sections of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. §§ 151 *et seq.* (1946 and Supp. III), and Section 1464 of the Criminal Code, 62 Stat. 769 (1948), 18 U. S. C. § 1464 (1946 Supp. III), are set forth in the appendix to this brief.

STATEMENT.

This action involves the validity of the Pennsylvania censorship regulation quoted above.

Petitioners, as members of the Pennsylvania State Board of Censors, adopted the regulation in an attempt to extend their censorship of motion pictures to include censorship of films used for broadcast by television in Pennsylvania. They adopted the regulation, as the District Court found, not because they had received evidence of any offensive matter broadcast over television, but because they had received complaints from motion picture exhibitors who apparently resented displaying the Board's seal of approval when television stations were not subjected to the same obligation.[2] Petitioners made no study of the television industry[3] to ascertain whether censorship was necessary or what practical effect it would have.

Respondents are corporations licensed by the Federal Communications Commission to operate television stations in Pennsylvania (R. 11). In the operation of their stations, respondents broadcast many programs which involve extensive use of film, sometimes integrated into an otherwise live program, sometimes used as a means of rebroadcasting a program recorded on film at the time of its original production and broadcast.[4]

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[2] See Plaintiffs' Requests for Findings of Fact, number 21 (R. 326), affirmed by the District Court (R. 319).

[3] *Ibid.*

[4] The findings of the District Court relating to the use of film in television are set forth as plaintiffs' requests 10, 11, 12 and 13 (R. 324-325), affirmed by the court with one modification (R. 319).

This film, in all its various uses, would be subjected to the prior censorship of the Board, requiring the Board's approval before it could be used for broadcast.

Accordingly, respondents instituted this action to obtain a declaratory judgment as to the validity of the censorship regulation.[5]

The District Court, Kirkpatrick, Ch. J., after taking testimony, made findings of fact which show, in detail, the operation of the television industry and its interstate character.[6] He found that the operation of petitioners' regulation would impose upon the television industry an undue and unreasonable burden to the point of obstructing, if not endangering the growth of the industry,[7] and that the regulation itself was unnecessary, undesirable and of dubious value.[8]

Petitioners did not challenge these findings in the Court of Appeals.

On the basis of these findings, the District Court entered its judgment holding that the regulation extending Pennsylvania's film censorship to television was invalid (R. 322) because the Congress, through the Communica-

[5] Jurisdiction of the District Court rested upon the existence of a controversy involving the requisite jurisdictional amount and arising under the Constitution and laws of the United States, Section 1331 of the Judicial Code, 62 Stat. 930 (1948), 28 U. S. C. § 1331 (1946 Supp. III), the action being brought under the declaratory judgment provisions of Section 2201 of the Judicial Code, 62 Stat. 964 (1948), since amended to correct an error in spelling, 63 Stat. 105 (1949), 28 U. S. C. § 2201 (1946 Supp. III).

[6] See plaintiffs' requests 4-9, 14-18 (R. 323-326), and the court's action thereon (R. 319).

[7] See plaintiffs' request 31 (R. 328), affirmed by the court (R. 319).

[8] See requests 26, 27, 28 (R. 327-388), affirmed by the court (R. 319).

tions Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. §§ 151 *et seq.* (1946 and Supp. III), had completely occupied the field of communication by radio and television to the exclusion of state regulation, including censorship. The court concluded also that, even if the Congress had not fully occupied the field, the regulation would be invalid because it would constitute an undue and unreasonable burden upon interstate commerce in television broadcasting (R. 318-319). Finally, the court affirmed respondents' requests for conclusions of law supporting the position that the censorship regulation would abridge the freedom of expression guaranteed by the First and Fourteenth amendments.[9]

On appeal by petitioners, the Court of Appeals for the Third Circuit, Biggs, Ch. J., and Maris and Goodrich, JJ., unanimously affirmed the judgment of the District Court, holding that the Congress, having committed the question of television program content to the Federal Communications Commission, had fully occupied the field to the exclusion of any attempt to impose state control of program content. The Court of Appeals did not discuss the questions whether the regulation would amount to an undue burden upon interstate commerce or would infringe freedom of speech and press.

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[9] See Plaintiffs' Requests for Conclusions of Law, numbers 15, 16, 17, and 18 (R. 329-330), affirmed by the District Court (R. 320).

Argument.

I.

THE DECISION BELOW IS CLEARLY CORRECT.

It is a familiar rule of law under our federal system of government that the existence of permitted federal legislation may invalidate an exercise of state power. *E. g.*, **International Union of United Automobile, Etc. Workers v. O'Brien**, 339 U. S. 454 (1950).

In the present case, the Communications Act of 1934 spells the invalidity of state censorship of radio or television program content,—even assuming that such censorship would otherwise be valid. The Act established a comprehensive scheme for the regulation on a national scale of virtually all communication facilities, leaving no doubt of a congressional intent completely to occupy the field to the exclusion of any form of state regulation of the same subject matter. *Cf.* **Napier v. Atlantic Coast Line R. R.**, 272 U. S. 605 (1926).

Moreover, the Act specifically deals with the matter of program content, **the very thing which petitioners would subject to their own regulationship by censorship.**

Any lingering question whether the Act contemplated that the Federal Communications Commission would concern itself with more than the engineering and technical phases of radio communication, and would affirmatively deal with the type of material broadcast, was effectively removed by this Court's decision in **National Broadcasting Co. v. United States**, 319 U. S. 190 (1943).

The Congress decided to regulate program content by establishing a scheme of federal licensing for radio and television, guarding against abusive use of the airwaves by imposing responsibility upon the individual station

licensee who would, before obtaining a license, be subject to administrative scrutiny as to his character and other qualifications [10] and would, in seeking periodic renewal of his license, be required to answer for his stewardship, including the type of material transmitted by his station.[11]

In addition, the Congress provided for license suspension and criminal penalties for the transmission of obscene or profane communications.[12]

This form of program control was to be accomplished **without the intervention of prior censorship**, and the Federal Communications Commission was specifically prohibited from censoring or otherwise interfering with the rights of free speech.[13]

The Congress thus established a form of program control, in the words of Judge Biggs below, "far broader and more effective than the antique method of censorship which Pennsylvania endeavors to effectuate in the instant case" (R. 338).

---

[10] Section 308 (b) of the Act prescribes the factors to be considered in passing upon the qualifications of a prospective station licensee. Transfer of a license is permitted only upon a similar investigation of the transferee. Sections 309 (b) (2), 310 (b). These sections are all set forth in the appendix to this brief, at pages 23-25.

[11] See Section 307 (d), set forth in the appendix, at pages 22-23.

[12] The license-suspension provision is Section 303 (m) (D), set forth in the appendix, at page 22. The criminal provision, originally adopted as Section 326 of the Communications Act, 48 Stat. 1091 (1934), has been re-enacted as Section 1464 of the Criminal Code, 62 Stat. 769 (1948), 18 U. S. C. § 1464 (1946 Supp. III), a fact obviously having no significance, despite petitioners' apparent thought that it does (Petition at page 16). This section is also set forth in the appendix, page 25.

[13] Section 326, set forth in the appendix at page 25.

The purported inability of petitioners to comprehend such a form of regulation and their fallacious assumption that the power of prior censorship of radio and television programs must exist *somewhere,* do not alter what the Congress has in fact done in the Communications Act.

Nor do they alter the constitutional principle of federal supremacy under which state censorship of radio and television is invalid because inconsistent with what the Federal Government has done, and inconsistent with the national policy established by the Communications Act. *Cf.* **Cloverleaf Butter Co. v. Patterson,** 315 U. S. 148 (1942); **Hines v. Davidowitz,** 312 U. S. 52, 74 (1941).

II.

PETITIONERS HAVE SHOWN NO REASON FOR REVIEW ON CERTIORARI BY THIS COURT.

Apparently the primary ground relied upon by petitioners for seeking a writ of certiorari in this case is their amazing assertion that no federal statute regulates communication by television and that an important federal question lurks behind the Court of Appeals' conclusion that the Communications Act of 1934 applies to television as well as to radio.

Petitioners appear to rely upon the consistent use of the word "radio" throughout the Act, concluding from this that, popular usage giving "radio" a different meaning from "television", the Act does not apply to television. They overlook the comprehensive definition in Section 3 (b) of the Act, set forth in the appendix to this brief, at page 21, which gives to the term "radio communication" a meaning embracing the "transmission by radio of writing, signs, signals, pictures, and sounds of all kinds".

This language obviously brings television, **the radio broadcasting of pictures,** within the scope of the regulatory provisions of the Communications Act.

If additional support were needed for this conclusion, the legislative history of the Communications Act and the history of congressional acquiescence in the exercise of jurisdiction over television, as reviewed by the Court of Appeals (R. 337), are more than adequate to demonstrate that television is unquestionably included within the scope of this legislation.

We respectfully suggest that this Court, in the discretionary exercise of its certiorari power, need not consider this case merely for the purpose of deciding that statutory language means what it says.

Petitioners assert also that there are several respects in which the decision below is in conflict or "probable conflict" with decisions of this Court.

They suggest, for one thing, that the court below decided that there was interstate commerce involved when a television station projects the image from film onto a plate located in the camera through which the image is transmitted over the airwaves. Petitioners say that this is "an activity which precedes interstate commerce", subject to regulation by the states, and that a decision that it "is interstate commerce" may conflict with cases where this Court has applied the so-called mechanical test of interstate commerce in defining the permissible scope of state taxing powers.

The short answer to this supposed conflict is that the Court of Appeals made no such decision. That court placed its judgment on the sole ground that the challenged Pennsylvania regulation was invalid because the same subject matter,—program content,—had already been subjected to a different form of control by the Congress.

We do not read the present petition for certiorari as suggesting that the Congress lacks constitutional power to

regulate television program content. Once the fact of such congressional regulation has been established, as it has here, state regulation in the same field is prohibited even though it might be valid in the absence of federal action.

Accordingly, there was no occasion for the Court of Appeals to deal with petitioners' wholly artificial attempts to designate some point in time and space marking the line of demarcation between intrastate commerce and interstate commerce.

Had it been necessary for the Court of Appeals to decide that the censorship regulation is invalid because it imposes an undue burden upon interstate commerce, petitioners' argument, that the regulation is immune from the commerce clause because it allegedly strikes at only an intrastate activity, would hardly merit serious consideration.

Even if the impact of the regulation could be said to fall upon an activity which in some theoretical sense precedes interstate commerce, it is too well settled for discussion that a state regulation may be invalid because it has a serious **effect** upon that commerce. **Lemke v. Farmers Grain Co.**, 258 U. S. 50 (1922); **Dahnke-Walker Milling Co. v. Bondurant**, 257 U. S. 282 (1921). State regulation does not depend for its validity upon the more arbitrary considerations sometimes necessarily used to mark the beginning of interstate commerce for purposes of the wholly different problems involved in passing on the validity of state taxation as in cases like **Utah Power & Light Co. v. Pfost**, 286 U. S. 165 (1932).

Those cases have no relevance here,—for any purpose.

Turning to the actual ground of the decision below, petitioners attack the decision of the Court of Appeals as in conflict with decisions of this Court "defining the scope of the Communications Act generally". They set forth

several quotations from **National Broadcasting Co. v. United States**, 319 U. S. 190 (1943), and **Regents v. Carroll**, 338 U. S. 586 (1950), and suggest that these quotations demonstrate the existence of a conflict. They do not explain why.

We submit that those decisions obviously do not demonstrate the existence of a conflict.

On the contrary, even the quotations set forth at page 8 of the petition make it clear that the Communications Act was designed to regulate the traffic in use of the airwaves in accordance with a standard of public interest, and that one thing with which the Act was concerned was the "composition of that traffic". **National Broadcasting Co. v. United States**, 319 U. S. 190, 216 (1943).

It is equally clear that petitioners have not shown a conflict by calling their regulation an exercise of the "police power" and charging that the court below failed to follow a rule, suggested by petitioners, that a police power regulation has some preferred position in our constitutional scheme.

As we read the decisions of this Court, they certainly do not give to the term "police power" any meaning as a test for the validity of state regulation. As Mr. Chief Justice Taney said in the **License Cases**, 5 How. 504, 583 (U. S. 1847), the police powers of a state "are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions".

Unless a power comports with the extent of the state's dominions, it cannot be exercised. Calling it a "police power" does not give it any special immunity from the supremacy clause.

In a final effort to conjure up some form of conflict, petitioners have even reached back to the decision of this Court in **Mutual Film Corp. v. Industrial Commission**, 236 U. S. 230 (1915), asserting that the Court of Appeals failed to give "sufficient effect" to that decision.

It is obvious that the **Mutual Film** case need not be considered for present purposes.

The case dealt with freedom of speech and press under the Ohio Constitution and with state burdens on interstate commerce as interdicted by the commerce clause of the Federal Constitution, holding that neither concept was violated by the censorship of motion pictures for use in theatres.

Whatever lingering vitality the case might have on those two points would have to be considered in the present case only if the court below was incorrect in deciding that the Communications Act of 1934 has occupied the field to the exclusion of any form of state censorship of television.

The **Mutual Film** case was not concerned with occupation of the field,—much less with an occupation of the field by the Communications Act. It does not have even a remote effect on the decision below, and it does not enter into a consideration of whether that decision should be reviewed here.

Petitioners' efforts to present some justification for review here of the decision below have largely ignored the fact that the decision rested solely upon federal occupation of the field,—an obviously sufficient basis for invalidating the Pennsylvania censorship regulation.

Petitioners have suggested nothing of substance to justify review of that decision. Instead, they have chosen to raise questions which would be presented only if the Court of Appeals had chosen other grounds upon which respondents believe that the challenged regulation is invalid.

Whatever merit there may be to those questions raised by petitioners,—and we believe that most of them are wholly lacking in substance,—it is surprising indeed to suggest them as a basis for certiorari to a decision that does not even raise the questions.

The decision below is so clearly correct, so clearly the only possible result consistent with the decisions of this Court, that we do not believe it necessary for this Court to grant certiorari in order to give its approval to that decision.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX.

Pennsylvania Act of May 15, 1915, P. L. 534, as Amended, Pa. Stat. Ann., tit. 4, §§ 41-58 (Purdon, 1930).

DEFINITIONS.

Section 1. Be it enacted, &c., That the word "film" used in this act means what is usually known as a motion-picture film.

The word "view" used in this act means what is usually known as a stereopticon view or slide.

The word "person" includes an association, co-partnership, or a corporation.

USE OF FILMS, REELS, OR VIEWS PROHIBITED.

Section 2. It shall be unlawful to sell, lease, lend, exhibit, or use any motion-picture film, reel, or view, in Pennsylvania, unless the said film, reel, or view has been submitted by the exchange, owner, or lessee of the film, reel, or view, and duly approved by the Pennsylvania State Board of Censors, hereinafter in this act called the board.

Sections 3, 4, 5. Repealed, Act of 1923, P. L. 498.

APPROVALS BY BOARD.

Section 6. The board shall examine or supervise the examinations of all films, reels, or views to be exhibited or used in Pennsylvania; and shall approve such films, reels, or views which are moral and proper; and shall disapprove such as are sacrilegious, obscene, indecent, or immoral, or such as tend, in the judgment of the board, to debase or corrupt morals. This section shall not apply to announcement or advertising slides or to films or reels containing current news events or happenings, commonly

known as news reels, which are not in violation of the provisions of this section. (As amended by the Act of May 8, 1929, P. L. 1655, § 1.)

Stamping Films, Reels and Views.

Section 7. Upon each film, reel, or view which has been approved by the board there shall be furnished and stamped by the board the following certificate or statement:

Approved by
Pennsylvania State Board
of Censors,

and shall also furnish a certificate, in writing, to the same effect, which certificate shall be exhibited to any member of the board or employe thereof upon demand of the holder thereof.

In the case of motion-pictures, such statement shall be shown on the screen, to the extent of approximately four feet of film.

In the case of slides or views, each set shall have at least two slides or views shown with a similar statement.

Record of Examinations.

Section 8. The board shall keep a record of all examinations made by it of films, reels, or views; noting on the record all films, reels, or views which have been approved, and those which have not been approved, with the reason for such disapproval.

Sections 9-16. Repealed, Act of 1923, P. L. 498.

Fees.

Section 17. For the examination of each film, reel, or set of views of one thousand two hundred lineal feet, or less, the board shall receive, in advance, a fee of two dollars, and two dollars for each duplicate or print thereof,

which must be applied for at the same time and by the same person. (As amended by the Act of June 12, 1919, P. L. 475, § 1.)

FEES AND FINES.

Section 18. All fees received by the board and all fines imposed for violation of this act shall be, by the board, paid into the State Treasury.

Section 19. Repealed, Act of 1923, P. L. 498.

REGULATIONS OF EXHIBITIONS.

Section 20. Any member or employe of the board may enter any place where films, reels, or views are exhibited; and such member or employe is hereby empowered and authorized to prevent the display or exhibition of any film, reel, or view which has not been duly approved by the board.

REGULATION OF BANNERS, POSTERS AND ADVERTISING MATTER.

Section 21. No banner, poster, or other like advertising matter shall contain anything that is immoral or improper. A copy of such banner and poster shall be submitted to the board.

RULES.

Section 22. This act shall be enforced by the board. In carrying out and enforcing the purposes of this act, it may adopt such reasonable rules as it may deem necessary. Such rules shall not be inconsistent with the laws of Pennsylvania.

Section 23. All disbursements of such a nature as to make it impracticable for the board to file, with the Auditor General, itemized receipts or vouchers prior to the advance by the accounting officers of funds sufficient to meet such expense, shall be paid out of money specifically appropri-

ated for that purpose, in the manner provided by an act, entitled "An act prescribing a method for disbursing and accounting for certain appropriations to the departments, bureaus, commissions, and other branches of the State Government," approved April twenty-third, Anno Domini one thousand nine hundred and nine.

DUTIES OF PERSONS WHO SELL, LEASE, EXHIBIT, OR USE FILMS, REELS, OR VIEWS.

Section 24. Every person intending to sell, lease, exhibit, or use any film, reel, or view in Pennsylvania, shall furnish the board, when the application for approval is made, a description of the film, reel, or view to be exhibited, sold, or leased, and the purposes thereof; and shall submit the film, reel, or view to the board for examination; and shall also furnish a statement or affidavit that the duplicate film, reel, or view is an exact copy of the original film, reel, or view, as submitted for examination to the board; and that all eliminations, changes, or rejections, made or required by the board in the original film, reel, or view, has been or will be made in the duplicate.

INTERFERENCE WITH EMPLOYES OF BOARD.

Section 25. It shall be unlawful for any person to hinder or interfere in any manner with any member or employe of the board while performing any duties in carrying out the intent or provisions of this act.

RE-EXAMINATION AND APPEAL.

Section 26. If any elimination or disapproval of a film, reel, or view is ordered by the board, the person submitting such film, reel, or view for examination will receive immediate notice of such elimination or disapproval, and, if appealed from, such film, reel, or view will be promptly re-examined, in the presence of such person, by two or more members of the board, and the same finally

approved or disapproved promptly after such re-examination, with the right of appeal from the decision of the board to the court of common pleas of the proper county.

Penalties.

Section 27. Any person who violates any of the provisions of this act, and is convicted thereof summarily before any alderman, magistrate, or justice of the peace, shall be sentenced to pay a fine of not less than twenty-five dollars, nor more than fifty dollars, for the first offense. For any subsequent offense the fine shall be not less than fifty dollars, nor more than one hundred dollars. In default of payment of a fine and costs, the defendant shall be sentenced to imprisonment, in the prison of the county where such offense was committed, for not less than ten days, and not more than thirty days. All fines shall be paid by the alderman, magistrate, or justice of the peace to the board, and by it paid into the State Treasury.

Section 28. If any person shall fail to display or exhibit on the screen the approval seal, as issued by the board, of a film, reel, or view which has been approved, and is convicted summarily before any alderman, magistrate, or justice of the peace, he shall be sentenced to pay a fine of not less than five dollars and not more than ten dollars; in default of payment of a fine and costs, the defendant shall be sentenced to imprisonment, in the prison of the county where such offense was committed, for not less than two days and not more than five days.

Limitation of Scope of Act.

Section 29. This act does not apply to any exhibition of or use of films, reels, or views, for purely educational, charitable, fraternal, or religious purpose, by any religious association, fraternal society, library, museum, public school, or private school, institution of learning, or by any corporation of the first class.

Section 30. The several sections and provisions of this act are hereby declared to be independent of each other; and it is the legislative intent that, if any of said sections or provisions are declared to be unconstitutional, such section or provision shall not affect any other portion of this act.

Relevant Sections of the Communications Act of 1934, 48 Stat. 1064, as Amended, 47 U. S. C. §§ 151 et seq. (1946 and Supp. III).

TITLE I—GENERAL PROVISIONS.

Purposes of Act; Creation of Federal Communications Commission.

Section 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act. [As amended, 50 Stat. 189 (1937).]

Application of Act.

Section 2. (a) The provisions of this Act shall apply to all interstate and foreign communication by wire or

radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio and to the licensing and regulating of all radio stations as hereinafter provided * * *.

* * * * * *

DEFINITIONS.

Section 3. For the purposes of this Act, unless the context otherwise requires—

* * * * * *

(b) "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

* * * * * *

(d) "Transmission of energy by radio" or "radio transmission of energy" includes both such transmission and all instrumentalities, facilities, and services incidental to such transmission.

* * * * * *

TITLE III—SPECIAL PROVISIONS RELATING TO RADIO.

LICENSE FOR RADIO COMMUNICATION OR TRANSMISSION OF ENERGY.

Section 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods

of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. * * *

GENERAL POWERS OF COMMISSION.

Section 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * * * *

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

* * * * * *

(m) (1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee—

* * * * * *

(D) has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning * * *.

* * * * * *

[As amended, 50 Stat. 190 (1937).]

ALLOCATION OF FACILITIES; TERM OF LICENSES.

Section 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

* * * * * *

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license

granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

* * * * * *

[As amended, 49 Stat. 1475 (1936).]

APPLICATIONS FOR LICENSES.

Section 308. (a) The Commission may grant licenses, renewal of licenses, and modification of licenses only upon written application therefor received by it * * *.

(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

HEARINGS ON APPLICATIONS FOR LICENSES; FORMS OF LICENSES; CONDITIONS ATTACHED TO LICENSES.

Section 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

(b) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

* * * * * *

(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

* * * * * *

LIMITATION ON HOLDING AND TRANSFER OF LICENSES.

Section 310.

* * * * * *

(b) The station license required, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer

is in the public interest, and shall give its consent in writing.

CENSORSHIP.

Section 326. Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. [As amended, 62 Stat. 862 (1948).]

Section 1464 of the Criminal Code, 62 Stat. 769 (1948), 18 U. S. C. § 1464 (1946 Supp. III).

Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

NO. 430

EDNA R. CARROLL, JOHN CLYDE FISHER and BEATRICE Z. MILLER, Petitioners,

v.

ALLEN B. DUMONT LABORATORIES, INC., PHILCO TELEVISION BROADCASTING CORPORATION, TRIANGLE PUBLICATIONS, INC., WCAU, INC., and WGAL, INC.

PETITIONERS' REPLY TO BRIEF FOR RESPONDENTS

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PETITIONERS' REPLY TO BRIEF FOR RESPONDENTS

This reply is filed in answer to certain statements in the brief for respondents.

On page 3 of respondents' brief it is stated that the Pennsylvania State Board of Censors "adopted the regulation, as the District Court found, not because they had received evidence of any offensive matter broadcast over television, but because they had received complaints from motion picture exhibitors".

The District Judge affirmed a request for finding of fact in this language (R. 326, 319). However, there is no evidence that the Board had not received evidence of offensive matter broadcast over television.

Miss Edna R. Carroll, Chairman of the Board, testified that the regulation was adopted after the Board had received complaints from motion picture exhibitors and "after a day and a half of listening to experts on television" (R. 280a); and that "the Board turned all the legal aspects * * * to the Department of Justice" (R. 283a) of Pennsylvania, including "the extent to which the television stations come within the jurisdiction of the Federal Communication Commission" (R. 283a); and that "the regulation was promulgated with the hope that our jurisdiction might be defined" (R. 278a).

The Chairman had had ten years of experience in censoring motion picture films before exhibition in theatres (R. 257a) and testified that "there were many bad ones for ten years" (R. 268a).

It is fundamental that a statute may not be declared unconstitutional because of regulations adopted or others acts of officials in administering it:

> *Cummings v. National Bank,* 101 U. S. 153, 161 (1879);
> *Michigan Central Railroad v. Powers,* 201 U. S. 245, 301 (1906).

Nothing in the opinion of the Chairman or in the regulation of the Board can furnish any ground for holding the Pennsylvania statute unconstitutional.

Television is undoubtedly a competitor of the motion picture theatre. If television programs are made up of 80%, or even 50% (R. 63a, 94a-95a, 270a) of films, then the lack of censorship of films in television

would enable films to be shown by television in the home and to escape the censorship which this court has held may be imposed by the states upon films exhibited in motion picture theatres.

The Federal Communications Act offers no protection against immoral or obscene films except the remote possibility that a complaint of an improper film may reach the Commission, and this after the film has been displayed by television and the harm has been done.

Respondents argue (p. 10) that the—

> "* * * state regulation may be invalid because it has a serious effect upon that commerce. Lemke v. Farmers Grain Co., 258 U. S. 50 (1922); Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282 (1921). * * *"

In the first case the state statute required the payment of a *license fee* for the privilege of purchasing grain and shipping it out of the state.

In the second case a state statute prescribed the conditions upon which a foreign corporation might do business in Kentucky. A Tennessee corporation was denied the right to purchase wheat in Kentucky and transport it to Tennessee.

In each of these two cases there was plainly an attempt by a State to deny the *fundamental right to engage in interstate commerce* which this court has unfailingly protected.

Thus in the leading case of *Crutcher v. Kentucky*, 141 U. S. 47 (1891), Mr. Justice Bradley said:

> "We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it. * * *" (58)

In each of the two cases cited by respondents, if the plaintiff did not pay the license fee or registration fee, the prohibition against engaging in interstate commerce was absolute.

In the case at bar Pennsylvania does not attempt to prohibit the respondents from operating a station to broadcast by television. News events and advertising matter may be broadcast without restriction. The Pennsylvania statute, however, under the police power does require other *films* to be censored in order to protect its citizens from the exhibition of immoral and obscene matter.

It by no means follows that because a State Police Statute may effect — even directly — interstate commerce, the statute in unconstitutional.

In *Eichholz v. Commission,* 306 U. S. 268 (1938), Chief Justice Hughes said:

> "* * * But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is *directly affected.* * * *" (274) (Italics added)

Again in *California v. Thompson,* 313 U. S. 109 (1941), Mr. Justice Stone said:

"As this Court has often had occasion to point out, the Commerce Clause, in conferring on Congress power to regulate commerce, did not wholly withdraw from the states the power to regulate matters of local concern with respect to which Congress has not exercised its power, even though the regulation *affects interstate commerce.** * *" (113) (Italics added)

The argument for respondents raises this novel question.

Is Pennsylvania denied the right to protect its citizens from immoral or obscene matter in television programs because incidentally such programs may spill over into or reach residents of adjoining states?

The Pennsylvania statute applies only to acts done in Pennsylvania—to the broadcasting of films by television in the state.

The calculated range of television broadcasting stations is about 45 miles, although some programs have been received at a distance of 78 miles (R. 30a-32a).

The purpose of censorship is to protect the people of Pennsylvania.

The programs from stations located in many portions of Pennsylvania would ordinarily not be carried beyond the boundaries of the State.

We submit that the State of Pennsylvania has the undoubted right to protect its own citizens and this right

cannot be denied because some programs originating in Pennsylvania may be carried over the boundaries to receiving sets in adjoining states. Any effect of the Pennsylvania censorship in preventing a program from reaching a receiving set in an adjoining state, is merely *incidental.*

Pennsylvania enforces numerous statutes intended to insure purety in the preparation of foods. Perhaps the greater proportion of these foods are shipped into other states and consumed there by residents there. Would anyone contend that Pennsylvania could not enforce its statute as to any products which might be received in another state?

It is true that Pennsylvania cannot prevent programs broadcast within its territory from reaching residents in adjoining states. It does not follow, however, that because of this inability the State of Pennsylvania must surrender or be denied its sovereign power to protect its own citizens.

Respondents have placed upon the Pennsylvania statute a narrow construction which aids their argument.

The Pennsylvania statute is not as drastic as some of respondents' witnesses have testified.

We particularly call attention to the last sentence of Section 6 of the Pennsylvania Act of May 15, 1915, which is quoted on page 22 of the brief heretofore filed for petitioner—

> "* * * This section shall *not apply to announcement or advertising slides* or to films or reels containing *current news events or happenings,* com-

monly known as *news reels,* which are not in violation of the provisions of this section." (Italics added)

This statute was enacted in *1915* not in 1950. The words "films or reels containing *current* news events" are not limited to the *live* programs exhibited today by television.

During the years since 1915 news reels, commonly called "short subjects", have been exhibited in theatres in Pennsylvania without censorship. There was no known method by which such news reels could exhibit live or contemperaneous events. A typical news reel exhibited in a motion picture theatre contained events which happened days or even weeks before the film was exhibited.

We therefore see nothing to prevent the respondents from making a film of a football game, or an inauguration, or public funeral, or any other news event and using such a film in its television stations throughout Pennsylvania or eleswhere. Such films, we believe, would be clearly within the exception in the Pennsylvania statute.

The invention of television and its adaptation to the broadcast of programs would not change the meaning of the words "current news events" in the exception.

The Pennsylvania Board does not "require films of advertising matter, spot announcements and commercial announcements on motion picture film to be submitted for censorship" (260a).

Respondents argue (p. 12) that petitioners ignore the fact that the opinion of the Court of Appeals was

based solely upon federal occupation of the field and that petitioners are raising additional questions—whether State censorship by the State would impose an undue burden upon interstate commerce and would abridge the freedom of speech.

Nevertheless respondents take pains to point out in their brief that the District Court adopted the conclusion that petitioners' regulation would impose an undue and unreasonable burden upon the television industry (p. 4) and would constitute an undue and unreasonable burden upon interstate commerce (p. 5).

Furthermore, respondents did argue at length in their briefs filed in the District Court and Court of Appeals that the Pennsylvania statute and regulation imposed an unreasonable and undue burden upon interstate commerce, violated the rule of uniformity and infringed the guarantee of freedom of speech.

On page 29 of brief for *petitioners* it is stated that *Hines v. Davidowitz,* 312 U. S. 52 (1941) was later explained by this court as being based upon the exclusive power of Congress over international relations. This latter decision is *Allen-Bradley Local v. Board,* 315 U. S. 740, 749 (1942).

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